COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM 35 CENTS PER NUMBER

MARCH, NINETEEN HUNDRED AND ELEVEN.

NOTES.

RECOVERY OF DAMAGES FOR INJURIES TO LAND LYING BEYOND THE JURISDICTION.—According to the common law it was well settled that an action for injuries to real property lying beyond the jurisdiction was not maintainable, on the ground that the action was local in character and could therefore be tried only where the land was situated.[1] This rule has been generally followed in the United States, for the most part unquestioningly,[2] the cases defining a local action as one having

[1]Doulson *v.* Matthews (1792) 4 Term. 503; but *cf.* Mostyn *v.* Fabrigas (1774) 1 Cowp. 161.

[2]Livingston *v.* Jefferson (1811) 1 Brock. 203; Howard *v.* Ingersoll (1853) 23 Ala. 673; American etc. Tel. Co. *v.* Middleton (1880) 80 N. Y. 408; Dodge *v.* Colby (1888) 108 N. Y. 445; McKenna *v.* Fisk (1843) 1 How. 241; Eachus *v.* Trustees etc. (1856) 17 Ill. 534; Allin *v.* Conn. River Lumber Co. (1890) 150 Mass. 560; Hill *v.* Nelson (1904) 70 N. J. L. 376; Ellenwood *v.* Marietta Chair Co. (1895) 158 U. S. 105; *cf.* Brereton *v.* Canadian Pacific Ry. Co. (Can. 1898) 29 Ont. 57; *contra* Barney *v.* Burstenbinder (N. Y. 1872) 7 Lans. 210; Holmes *v.* Barclay (1849) 4 La. Ann. 63; Little *v.* Chi. etc. Ry. Co. (1896) 65 Minn. 48; *cf.* Campbell *v.* McGregor (Can. 1889) 29 N. B. 644.

a peculiar relation to the particular locality, whereas in a transitory action, the locality occupies a merely incidental position.[3] It has been supposed that the distinction was an artificial one, based upon the arbitrary requirements as to the laying of venues,[4] and that consequently upon the abolition of the latter rules, the distinction became unimportant, and no longer prevented the exercise of an existing jurisdiction.[5] This position was definitely repudiated in England, where the Privy Council indicated that the rule as to venues was based upon an inherent difference between local and transitory actions and was not their efficient cause, and held that with respect to local actions accruing extraterritorially there was an essential lack of jurisdiction.[6]

The conception of sovereignty includes within it the idea of a theoretically unlimited jurisdiction,[7] but a practical test of essential jurisdiction is to be found in the sovereignty's power to make effectual a decree pronounced in the exercise of whatever jurisdiction it has assumed.[8] Within these limits, the extent to which, and the circumstances under which, a sovereignty will take jurisdiction, would seem to be a matter for regulation in accordance with its own principles of policy and expediency, rather than with the principles of the Conflict of Laws,[9] and whatever rules have been enunciated by the courts of the sovereignty in this respect, must be regarded as arbitrary and artificial limitations upon its inherent powers from the standpoint of essential jurisdiction.[10] At the same time, however, these same limitations may be natural and reasonable in view of the local considerations founding them, without being necessitated by an essential lack of jurisdiction.

It is undoubtedly true that an action for damages to real property is in a sense local as distinguished from an action for personal damages, in that the title to such property may be put in issue, and there is perhaps no principle of Conflict of Laws more firmly established than that which accords to the *lex rei sitae* the ultimate control over real property.[11] Equity nevertheless, without presuming to directly affect the title, has exercised a considerable jurisdiction with respect to foreign lands, by virtue of its power to effectuate its decrees by

[3]Livingston *v.* Jefferson *supra;* McGonigle *v.* Atchison (1885) 33 Kan. 726.

[4]Livingston *v.* Jefferson *supra;* Little *v.* Chi. etc. Ry. Co. *supra;* Comphania etc. *v.* Br. So. Africa Co. L. R. [1892] 2 Q. B. 358; 21 Am. L. Reg. [N. S.] 604.

[5]Comphania etc. *v.* Br. So. Africa Co. *supra;* Little *v.* Chi. etc. Ry. Co. *supra;* 22 Alb. L. J. 47.

[6]Br. So. Africa Co. *v.* Comphania etc. L. R. [1893] A. C. 602.

[7]Schooner Exchange *v.* M'Fadden (1812) 7 Cranch 116, 136.

[8]Story, Confl. of L. §551; Dicey, Confl. of L. (Am. ed.) 38; 21 Am. L. Reg. [N. S.] 604; see Livingston *v.* Jefferson *supra;* Mostyn *v.* Fabrigas *supra.*

[9]Br. So. Africa Co. *v.* Comphania etc. *supra;* Huntington *v.* Attrill (1892) 146 U. S. 657.

[10]See Br. So. Africa Co. *v.* Comphania etc. *supra;* Schooner Exchange *v.* M'Fadden *supra;* Peyton *v.* Desmond (1904) 129 Fed. 1.

[11]Story, Confl. of L. §551; Wharton, Confl. of L. §276b; North. Ind. R. R. Co. *v.* Mich. Central R. R. Co. (1853) 15 How. 233; Davis *v.* Headley (1871) 22 N. J. Eq. 115; Healy *v.* Humphrey (1897) 81 Fed. 990.

acting upon the person of the defendant.[12] Where similarly therefore, a State, acting through its courts, without presuming to determine title to foreign real property, does so incidentally, in order to give damages for the satisfaction of an injury done to such property by a person before the court, and against whom its process may be enforced, the essential lack of jurisdiction is not apparent.[13] It may be said that theoretically at least a determination of matters involving title to foreign real property should be left to the jurisdiction in which the ultimate power of decision rests,[14] but this must be answered, it would seem, by the contention that the ultimate determination of the title is not sought for, but only an incidental one, for the immediate purposes of a decision, the entire object of which is to give money damages to the person injured.[15] There would seem to be no reason for distinguishing a case of this nature from one involving severance from the realty and conversion,[16] or the adjudication of contractual obligations incidentally involving title to land,[17] in all of which cases the determination of title is potentially involved. The argument however advocating a transitory quality for actions upon injuries to real property, based on the hardship which would result to the plaintiff from the departure of the defendant from the jurisdiction where the property is situated,[18] would be deprived of its effectiveness except in the jurisdiction of the plaintiff's residence, it would seem, because of the tendency of the courts to unburden themselves of all litigation concerning foreign interests solely.[19]

In a recent case, *Brisbane* v. *Pennsylvania R. Co.* (1910) 125 N. Y. Supp. 1042, the court held that a demurrer to a complaint alleging negligent damage to the plaintiff's real property in New Jersey was improperly sustained since the action was transitory and personal, the gravamen being negligence, and also that the plaintiff being a resident the action was maintainable against a foreign corporation, whatever the cause of action, under § 1780, Code of Civil Procedure. This particular provision of the Code would not seem to warrant an enlargement of jurisdiction with respect to a foreign corporation, except in the sense that before statutory provision was made, no action whatever was maintainable without a voluntary appearance on the part of the corporation.[20] Beyond this the provision apparently indicates

[12]Wharton, Confl. of L. §§288, 289a; Penn. *v.* Lord Baltimore (1750) 1 Ves. Sr. 444; Massie *v.* Watts (1810) 6 Cranch 148.

[13]Sentenis *v.* Ladew (1893) 140 N. Y. 463; see Grant *v.* Cananea Copper Co. (1907) 189 N. Y. 241.

[14]*Cf.* 1 Sm. L. Cas. (8th Am. ed.) p. 1075n.

[15]Livingston *v.* Jefferson *supra;* Little *v.* Chi. etc. Ry. Co. *supra;* Hill *v.* Nelson *supra;* Barney *v.* Burstenbinder *supra.*

[16]McGonigle *v.* Atchison *supra;* Whidden *v.* Seelye (1855) 40 Me. 247; Stone *v.* U. S. (1896) 167 U. S. 178; see Greely *v.* Stilson (1873) 27 Mich. 153.

[17]Hill *v.* Nelson *supra;* see Cragin *v.* Lovell (1882) 88 N. Y. 258; Worley *v.* Hineman (1892) 6 Ind. App. 240.

[18]Little *v.* Chi. etc. Ry. Co. *supra;* see Mostyn *v.* Fabrigas *supra;* Stone *v.* U. S. *supra.*

[19]Collard *v.* Beach (N. Y. 1904) 93 App. Div. 339; Anglo-Am. Prov. Co. *v.* Davis Prov. Co. (1902) 169 N. Y. 506.

[20]Hann *v.* Barnegat etc. Co. (N. Y. 1885) 7 Civ. Proc. 222; Ladenburg *v.* Com. Bank (N. Y. 1895) 87 Hun 269; Jacobs *v.* Mexican etc. Co. (N. Y. 1905) 104 App. Div. 242.

merely what interest is necessary in the litigant to warrant an application to the local court.[21] Although the tendency in New York to except cases of the nature of the one under discussion, having negligence as the gravamen of the action,[22] from the rule governing actions for direct injuries to land,[23] is a salutary one, the distinction is hardly warranted by the cases, even in New York,[24] for here too the determination of title may be necessitated.[25] Since however there is no essential lack of jurisdiction in the courts with respect to such actions, it would seem preferable where, as in this case, the proper interest appears in the plaintiff, for the New York Courts to take cognizance of actions for injuries to real property lying beyond its borders, rather than to unnecessarily force a resident to pursue the wrongdoer beyond the jurisdiction.[26]

THE UNAUTHORIZED ISSUE OF CORPORATE STOCK.—The rights and liabilities arising from an over-issue of corporate stock are primarily determinable from a consideration of the nature of a corporation.[1] The conception that a corporation is a being of such limited powers that any attempt to transgress the boundaries set by its charter is necessarily a nullity, and the more generally accepted doctrine that as the corporation is a creature of law, any exercise of power in excess of the statutory authorization is impliedly prohibited and consequently illegal, are both products of the period when the privilege of assuming corporate powers was a special franchise. Although these theories are logically defensible, their application demonstrates that their failure to give proper recognition to the correlation of interests of State, stockholders, and creditors, often causes manifest injustice. As neither the State[2] nor the stockholders[3] unaided by the other can bring a corporation into being,[4] the powers of an entity organized through the concurrence of both are not traceable

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[21]Robinson *v.* Oceanic Steam. Nav. Co. (1889) 112 N. Y. 215; Anglo-Am. Prov. Co. *v.* Davis Prov. Co. *supra.*

[22]Barney *v.* Burstenbinder *supra;* Home Insurance Co. *v.* Penna. R. R. Co. (N. Y. 1877) 11 Hun 182.

[23]Mott *v.* Coddington (N. Y. 1863) 1 Abb. Pr. [N. S.] 290; American etc. Tel. Co. *v.* Middleton *supra;* Cragin *v.* Lovell *supra;* Dodge *v.* Colby *supra;* Hurd *v.* Miller (N. Y. 1859) 2 Hilt. 540; DeCourcy *v.* Stewart (N. Y. 1880) 20 Hun 561; Huenermund *v.* Erie Ry. Co. (N. Y. 1874) 48 How. Pr. 55; see Sprague Nat. Bank *v.* Erie R. R. Co. (N. Y. 1899) 40 App. Div. 69; Watts *v.* Kinney (N. Y. 1843) 6 Hill 82.

[24]Mott *v.* Coddington *supra;* Cragin *v.* Lovell *supra;* see cases cited in note 2.

[25]Brereton *v.* Canadian Pac. Ry. Co. *supra.*

[26]See Grant *v.* Cananea Copper Co. *supra.*

[1]See 7 COLUMBIA LAW REVIEW 196; 5 COLUMBIA LAW REVIEW 235; 8 COLUMBIA LAW REVIEW 403; Machen, Corporate Personality, 24 Harv. L. Rev. 250.

[2]Kenosha R. & R. I. R. R. Co. *v.* Marsh (1863) 17 Wis. 13.

[3]See Stowe *v.* Flagg (1874) 72 Ill. 397; Morawetz, Private Corporations (2nd ed.) § 8.

[4]See Machen, Modern Law of Corporations §§ 31, 32 & 33; Morawetz, Private Corporations (2nd ed.) § 37; *cf.* Briscoe *v.* The Bank of the Commonwealth of Kentucky (1837) 11 Pet. 257.